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In The

Supreme Court of the United States

October Term, 1990

CHICAGO AND NORTH WESTERN TRANSPORTATION CO.,

Petitioner,

v.

HONORABLE NICHOLAS G. BYRON, JUDGE, CIRCUIT COURT OF MADISON COUNTY, ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Illinois

BRIEF IN OPPOSITION OF RESPONDENT JUDGE BYRON

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BRIEF IN OPPOSITION OF RESPONDENT JUDGE BYRON

The respondent, Honorable Nicholas G. Byron, Associate Judge of the Circuit Court of Madison County, Illinois, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of an order of the Supreme Court of Illinois.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Order Of The Supreme Court Is Not A Final Determination On The Merits Of The Federal Questions Presented By The Petitioner.

This Court has explained that, as a matter of jurisdictional or prudential limitation, it will not address a question that was not pressed or passed on below. *Illinois v. Gates*, 462 U.S. 213, 217-24 (1983). While the petitioner sought to raise federal issues before the Illinois Supreme Court, the three-sentence order of that court reveals no disposition of the merits of petitioner's claim. That order is admittedly final, to the extent that it terminates petitioner's attempted original action in that forum, but it should not be regarded either as a pronouncement on the merits of the federal questions raised or as a final disposition by the state courts with regard to those issues.

Article VI, section 4 of the Illinois Constitution of 1970 authorizes the supreme court to exercise original jurisdiction, as a matter of its discretion, in cases seeking an order of prohibition. Illinois Supreme Court Rule 381, Ill. Rev. Stat. ch. 110A, ¶ 381 (1989), sets forth the procedure for pursuing an original action in that court. The rule requires the filing of a preliminary motion for leave to file a complaint for relief. It further specifies that a judge whose judicial act is sought to be reviewed is only a nominal party to the supreme court proceeding. Ill. Rev. Stat. ch. 110A, ¶ 381(c) (1989). In practice, the prevailing party below will typically defend the order sought to be reviewed.

The great majority of actions initiated pursuant to Supreme Court Rule 381 do not progress beyond the

preliminary motion stage. The court has explained that an order of prohibition should not normally be awarded if other available remedies are adequate, *Hughes v. Kiley*, 67 Ill. 2d 261, 367 N.E.2d 700, 702 (1977), and the availability of other remedies will typically be advanced by a respondent as a reason why the case should not be accepted for consideration on the merits.[1]

In this case, petitioner seeks review of a court order that only denied, as a matter of discretion, the opportunity to maintain an original action for an order of prohibition or other relief.[2] The appendix supplied by the

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[1] Although petitioner's appendix to its petition in this Court indicates service by mail to this respondent, Judge Byron did not receive the mailed documents and first became aware of the attempted original action upon his receipt of the supreme court's order denying the same. Marlin Garien, the real party in interest, was named as a respondent in the Illinois proceeding and opposed the petitioner's motion.

[2] Illinois Supreme Court Rule 383, Ill. Rev. Stat. ch. 110A, ¶ 383 (1989), specifies procedures for invoking that court's supervisory authority as vested by article VI, section 16 of the Illinois Constitution of 1970. Petitioner's alternative request for a supervisory order was in derogation of prescribed procedure, *see* Committee Comments following Rule 383, Ill. Ann. Stat. ch. 110A, ¶ 383 (Smith-Hurd 1985), and sought an inappropriate remedy for questions that petitioner frames strictly as legal issues before this Court.

A request for a supervisory order does not normally result either in full briefing of the issues or an opinion from the court. Although the judge is a named respondent in a motion for a supervisory order, he is not required to participate in a Rule 383 proceeding, where it is expected that the prevailing party below will advocate on behalf of the judge's ruling. The supreme court's denial of supervisory relief is no more an adjudication of a federal question than its denial of leave to seek an order of prohibition.

petitioner demonstrates that there is an ongoing case in the Circuit Court of Madison County, over which Judge Byron is currently presiding. Petitioner's disagreement with Judge Byron's ruling should not be made the subject of litigation in this Court between the judge and one of the parties before him in a still-pending matter. Instead, the petitioner should be obliged to pursue its state court remedies, including the right to appellate review of a final decision of a circuit court, Ill. Const. (1970), art. VI, § 6, and the further right to seek leave to appeal to the Illinois Supreme Court. Ill. Rev. Stat. ch. 110A, ¶ 315 (1989).

In its petition for writ of certiorari, petitioner relies on three cases in support of its contention that the order of the Illinois Supreme Court is final and subject to review by this Court: *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Madruga v. Supreme Court*, 346 U.S. 556 (1954), and *Fisher v. District Court of Sixteenth Judicial District*, 424 U.S. 382 (1976). These cases do not, however, support the contention that a writ should issue to the Illinois Supreme Court. In each of the cases cited by petitioner, the state supreme court had entertained the litigation on the merits and had issued a published opinion addressing the merits of the claims. In the case at bar, no such decision has issued from the Illinois Supreme Court. This distinction is critical, and it should lead this Court to conclude that the issues raised by the petitioner are not subject to review in this Court at the present time.

2. Marlin Garien, Rather Than Judge Byron, Is The Real Party In Interest With Regard to The Order Sought To Be Reviewed.

Rule 12.4 of this Court provides that "[a]ll parties to the proceeding in the court whose judgment is sought to

be reviewed shall be deemed parties in this Court . . . ," unless the petitioner believes a party below is not interested in the proceedings in this Court. As previously explained, Judge Byron was only a nominal party in the Illinois Supreme Court; he had no actual knowledge of the proceeding and did not appear personally or through counsel before the supreme court. However, Appendix G to the petition filed in this Court shows that Marlin Garien was a named respondent in the supreme court, and Judge Byron understands that Garien's attorney did file an objection on behalf of his client in the supreme court.

Judge Byron submits that Garien is a necessary and proper party to any proceeding in this Court and that it is Garien, rather than the judge presiding over ongoing litigation between Garien and petitioner, who should address the substantive issues sought to be raised in this Court. Under Illinois law, an interlocutory order can be reviewed, modified or vacated at any time before entry of a final judgment, *Catlett v. Novak*, 116 Ill.2d 63, 506 N.E.2d 586, 589 (1987), and it is conceivable that further rulings might be sought from Judge Byron during the pendency, or upon a denial, of the petition in this Court. Accordingly, Judge Byron will leave the substantive aspects of this argument to the parties to the litigation below, but he urges this Court to deny the petition before it on the basis of the procedural grounds cited above.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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